THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

Writ Petition Nos.19973 and 21919 of 1998

Date: 17.03.2006

Between:

Col. R.R. Kumar, S/o late R.V.Rama Rao, aged about l57 years, R/o Secunderabad.

… Petitioner.

And

The Union of India rep.,by its Secretary, Ministry of Defence, New Delhi.

… Respondents.

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

Writ Petition Nos.19973 and 21919 of 1998

COMMON ORDER:

Questioning the proceedings of the 2nd respondent dated 26.3.1998 in rejecting the statutory complaint filed by the petitioner on 1.1.1998, W.P.No.19973 of 1998 is filed. Questioning the action of the respondents, in retiring the petitioner from service on 18.12.1997, as illegal, arbitrary and discriminatory, W.P.No.21919 of 1998 is filed.

Both the writ petitions were heard together and are now being disposed of by a common order.

The facts, to the extent necessary, are that the petitioner, on completing his graduation in Medicine from Guntur Medical College, joined the Army in 1965. He was promoted as a Colonel in the year 1994 and was working as the Senior Registrar at the Military Hospital in Secunderabad. The petitioner was due for promotion as Brigadier and his case was considered by the Selection Committee in its meeting held on 19.12.1996. Petitioner was informed, vide letter dated 25.2.1997, that he had been over looked for promotion to the rank of Brigadier as he was graded (R) (unfit for promotion at present). Subsequent thereto, the petitioner submitted an application in February, 1997 seeking premature retirement. On 27.3.1997, he submitted a statutory complaint, under Regulation 364 of the Defence Service Regulations, against his being overlooked for promotion. The petitioner's application for premature retirement was accepted, vide proceedings dated 23.9.1997, and he was informed that he would retire from service with effect from 17.12.1997. The petitioner, vide letter dated 21.11.1997, informed the respondents of the withdrawal of his application for premature retirement and requested that he be permitted to continue in service.

The petitioner filed W.P.32069/97 questioning the proceedings dated 23.9.1997 wherein his application for premature retirement had been accepted. He also filed W.P.29679 of 1997 seeking a direction to the respondents to consider his statutory complaint first and till then not to enforce the proceedings dated 23.9.1997 whereby he was to retire from service on 17.12.1997. Both the writ petitions were disposed of by a common order on 9.2.1998. This court, on taking note of the averments, in the counter affidavit filed in W.P.29679 of 1997, that the petitioner was free to submit a fresh statutory complaint if he so desired and the same on receipt would be considered by the Government on merits, held that since the respondents had agreed to consider the petitioner's case once again and to decide the representation, there was no reason to refuse the prayer of the petitioner. This Court accordingly directed the respondents to consider the application made by the petitioner on 1.1.1998 and dispose of the same within three months. Though the proceedings dated 23.9.1997, (wherein the petitioner's application for premature retirement had been accepted), was also the subject matter of challenge in W.P.29679 of 1997, no relief was granted in the said writ petition. The order passed

by this Court, in W.P.Nos.32069 and 29679 of 1997, on 9.2.1998, has attained finality.

In the proceedings dated 23.9.1997, it is stated that the Government had approved the premature retirement of certain officers, including the petitioner, and that the officers may be relieved of their duties as early as possible and not later than 17.12.1997. The petitioner's application dated 21.11.1997 for withdrawal of his earlier application for premature retirement was rejected, vide proceedings dated 17.12.1997 and the petitioner was informed that he would be required to retire from service on 17.12.1997 (AN)/18.12.1997 (FN).

Capt.K.M.Saxena, learned counsel for the petitioner, would submit that since the petitioner's statutory complaint dated 1.1.1998, against his supersession for promotion to the rank of Brigadier, was rejected, vide proceedings dated 26.3.1998 on the ground that it lacked substance, W.P.No.19973 of 1998 was filed and questioning the order of the respondents in retiring him from service on 18.12.1997, W.P.21919 of 1988 was filed. Capt.K.M.Saxena, would submit that since the petitioner had withdrawn his application for premature retirement, vide his letter dated 21.11.1997, prior to the date on which his retirement was to come in to effect from 17.12.1997, he was entitled to continue in service till he reached the age of superannuation of 59 years. Learned counsel would refer to Rule 16(a) of the Army Rules, 1954 in support of his submission that the petitioner is entitled to continue in service upto 59 years and since he was 56 years when he was retired from service, the petitioner was entitled to continue in service up to 30.9.2000. Learned counsel places reliance on **Balram Gupta v. Union of India** and **Major K.K.Sethi v. Union of India** in support of his submission that the petitioner was entitled to withdraw his application for premature retirement at any time prior to the date on which it came into effect.

In so far as the petitioner's supersession, for promotion to the rank of Brigadier, is concerned, Capt.K.M.Saxena, would submit that since the petitioner's commandant had graded him as an outstanding officer in the year 1995 and above average in the year 1996 and while forwarding the petitioner's statutory complaint, the very same commandant, Brigadier Sri S.V.Vatve, had strongly recommended the petitioner's case for promotion and for reappraisal of his ACRs, the petitioner ought to have been promoted as Brigadier and his supersession is arbitrary and illegal.

On the question as to whether the order passed by this Court in W.P.Nos32069 and 29679 of 1997 dated 9.2.1998 precluded the petitioner from filing a fresh writ petition seeking the same relief , Capt. Saxena would refer to Section 27 of the Army Act to contend that a statutory complaint can be filed only by a serving army officer and since the petitioner's statutory complaint was regarding his promotion and a person can only be promoted if he is in service or he has retired and cannot claim promotion if he has resigned, the concession of the respondents, in their counter affidavit, in effect, meant that they had conceded that the petitioner continued in service and his request for withdrawing his earlier application for premature retirement, had been accepted. Learned counsel would submit that in view of this concession, in the counter filed in W.P.29679/97, the petitioner would be entitled to continue in service till he reached his age of superannuation on 30.9.2000. In so far as denial of promotion to the petitioner is concerned, learned counsel would submit that where there are adverse remarks or reduction in the marks assigned in the overall grading, the employee who suffers such an adverse rating is required to be put on notice. Learned counsel would submit that since the petitioner was not put on notice, it must be inferred that the petitioner's ACRs, for the relevant years 1994-95 and 1995-96, were not less than his rating for the earlier years.

Sri A.Rajasekahr Reddy, learned Assistant Solicitor General, would submit that none of the contentions urged by Capt.K.M. Saxena, learned counsel for the petitioner across the Bar, are supported by necessary pleadings in this regard. Learned Assistant Solicitor General would submit that since the petitioner's request for premature retirement had been accepted and the order dated 23.9.1997, retiring him from service, was subject matter of challenge in W.P.32069/97, the order in the writ petition is binding on the petitioner and since no relief was granted in favour of the petitioner, it was not open to the petitioner to file a subsequent writ petition questioning the very same proceedings dated 23.9.1997. Learned Assistant Solicitor General would submit that during the pendency of W.P.32069/97 and W.P.29679/97, before this Court, the petitioner had withdrawn his statutory complaint and at the time of disposal of the writ petition, he had stated that he would file a fresh statutory complaint. Learned Assistant Solicitor General would submit that all that has been stated in the counter affidavit, filed in those writ petitions, was that the petitioner was free to submit a statutory complaint. According to the learned Assistant Solicitor General this did not amount to a concession that the petitioner

was in service or that he is deemed to continue in service or even that the government had put its seal of approval on the petitioner's request to withdraw his earlier application seeking premature retirement. Learned Assistant Solicitor General would submit that the principles of res judicata would apply and since the order, passed in the earlier writ petitions, had worked itself out and had attained finality, the petitioner was estopped from contending otherwise. Learned Assistant Solicitor General would refer to Regulation 105(e), of the Defence Service Regulations, and submit that withdrawal of resignation cannot be as a matter of course and since the petitioner, pursuant to Regulation 105(e), had submitted an undertaking that he would not withdraw his application seeking voluntary retirement, the petitioner must be deemed, in law, to have waived his right to withdraw his application for premature retirement. In so far as supersession of the petitioner to the rank of Brigadier is concerned, learned Assistant Solicitor General would submit that the selection committee, consisting of the Chief of Army Staff and other Senior Officials of the Armed Forces, on a comparative assessment of the merits of the eligible candidates, as reflected by their ratings in the ACRs for the years 1994-95 and 1995-96, had selected officers for promotion to the rank of Brigadier, and since the petitioner was rated as (R), (unfit for promotion), he was denied promotion. Learned Assistant Solicitor General would refer to the ratings of the petitioner, by different officials, and submit that since these ratings reflect assessment of the petitioner's performance, by senior officials, this Court would not sit in appeal over the decision of the Selection Committee, more so where the selection is for appointment to a senior rank of Brigadier in the Army. He would contend that while the scope of judicial review, in matters of selection, is extremely limited, it is more so in the case of the armed forces where this court would, normally, defer to the wisdom of the selection committee. Learned counsel would place reliance on **Major General J.K.Bansal v. Union of India** and **Lt. Col.K.D.Rana v. Chief of Army Staff, Army Headquarters, DHQPO, New Delhi.**

Before examining the rival contentions it is necessary to briefly take note of the relevant statutory provisions. Sections 26 and 27 of the Army Act, 1950 read as under:

"26.Remedy of aggrieved persons other than officers:- (1) Any person subject to this Act other than an officer who deems himself wronged by any superior or other officer may,

if not attached to a troop or company, complain to the officer under hose command or orders he is serving; and may, if attached to a troop or company, complain to the officer commanding the same.

(2) When the officer complained against is the officer to whom any complaint should, under sub-section (1), be preferred, the aggrieved person may complain to such officer's next superior officer;

(3) Every officer receiving any such complaint shall make as complete an investigation into it as may be possible for giving full redress to the complaint; or when necessary, refer the complaint to superior authority.

(4) Every such complaint shall be preferred in such manner as may from time to time be specified by the proper authority;

(5) The Central Government may revise any decision by the Chief of the Army Staff under sub-section(2), but, subject thereto, the decision of the Chief of the Army Staff shall be final.

27. Remedy of aggrieved officers:- Any officer who deems himself wronged by his commanding officer or any superior officer and who on due application made to his commanding officer does not receive the redress to which he considers himself entitled, may complain to the Central Government in such manner as may from time to time be specified by the proper authority. "

Regulation 364, of the Defence Service Regulations, relates to complaints including statutory complaints and provides that the complaint may be of two kinds, (1) statutory complaints under Sections 26 and 27 of the Army Act and (2) non-statutory complaints. Regulation 364 prescribes the manner and the procedure for submission of statutory complaints.

While it is no doubt true that a statutory complaint can be filed only by a serving officer, the question which falls for consideration is as to whether the respondents, in conceding that it was open for the petitioner to file a statutory complaint, had, in effect, conceded, by implication, that the petitioner was still in service and that the respondents had acceded to his request to withdraw his earlier application seeking premature retirement. It is therefore necessary to briefly examine as to what was in issue before this Court in W.P.Nos.29679 and 32069 of 1997. The petitioner herein had filed W.P.No.29679 of 1997 seeking a direction to the respondents to consider his statutory complaint first and not to enforce the proceedings dated 23.9.1997, whereby the Government had approved request of premature retirement in respect of certain officers, including the petitioner herein, and had informed that they may be relieved of their duties as early as possible, not later than 17.12.1997. W.P.No.32069 of 1997 was filed by the petitioner seeking a

declaration that the order of the 3rd respondent in proceedings dated 23.9.1997 and the consequential order dated 10.11.1997 were illegal and void. In the counter affidavit filed in W.P.32069 of 1997, it is specifically stated that along with other eligible officers, the petitioner was considered for promotion, to the rank of Brigadier, by the Selection Committee in its meeting held on 19.12.1996 and since the average of the ACRs of the petitioner, as considered by the Board, did not come up high in merit, his case for promotion was rejected and he was graded as 'R' (unfit for promotion to the next higher rank at present). It was also stated therein that the petitioner had submitted an application for premature retirement from service on 4.2.1997 on the ground of supersession for promotion, that as per rules, every officer desirous of leaving Army service should apply for the same after seriously weighing the pros and cons of premature retirement, because applications for withdrawal of requests for premature retirement made subsequently, at an advanced stage of consideration of such request, would cause severe administrative difficulties and problems and that premature retirement could only be as a last resort when no other alternative remedies were available. It was further stated therein that if he had any grievance with regard to his promotion, the petitioner could have first sought redressal through the channels available under the Army Act and the rules of service, that while his application for premature retirement was being processed, the petitioner submitted a statutory complaint on 27.3.1997 and since these two applications – one for premature retirement and another relating to statutory complaint, were contrary to each other, the respondents decided to process the application for premature retirement, after finalization of the statutory complaint. It is stated that in the meanwhile, the petitioner withdrew his statutory complaint, by certificate dated 11.6.1997, and consequent thereto the complaint was closed as 'withdrawn' and the petitioner's application for premature retirement was processed further, and since the petitioner's statutory complaint had been withdrawn, there was no question of processing a non-existing statutory complaint. It is stated that the petitioner's request for premature retirement was processed and the Government granted approval, for acceptance of his request for premature retirement, on 19.9.1997. It is further stated in the counter affidavit, filed in W.P.32069 of 1997, that the petitioner again changed his stand and though there was no provision in the Army Act or in the service rules for withdrawal of the certificate dated 11.6.1997, (request for withdrawal of statutory complaint), the petitioner had submitted such an application on 3.9.1997 which was received by the government on 30.9.1997. Since

it had already approved the petitioner's request for premature retirement on 19.09.1997, the government could not agree for canceling the certificate dated 11.6.1997 and the petitioner was communicated accordingly on 10.11.1997. It is further stated that this Court passed an interim order, in W.P.29679 of 1997, on 10.12.1997 to continue the petitioner till his request for withdrawal of premature retirement, vide letter dated 21.11.1997, was disposed of, that the respondents had considered his request, and had, vide proceedings dated 17.12.1997, rejected his request for withdrawal of his application for premature retirement, and the same was communicated by order dated 18.12.1997. Respondents state that since no statutory complaint filed by the petitioner was pending, there was no ground to process his closed statutory complaint. Having stated thus, the respondents stated as under:

"Further the petitioner is free to submit a fresh statutory complaint if he so desires and the same on receipt will be considered by the Government on merits"

The respondents had taken a categorical stand, in their counter affidavit filed in W.P.No.32069/97, that withdrawal of application for premature retirement would not be permitted as a matter of course, that the petitioner's application for premature retirement was processed only after he had withdrawn the statutory complaint and that his request for premature retirement had been accepted. The respondents had also referred to the interim order of this Court to continue the petitioner till the disposal of his request for withdrawal of premature retirement and to the proceedings dated 18.12.1999 whereby the petitioner was informed that his application for withdrawal of his request for premature retirement was rejected on 17.12.1997. Since a conscious decision was taken by the respondent to accept the petitioner's request for premature retirement and his subsequent application seeking permission to withdraw the application in this regard was expressly negatived and he was informed accordingly, vide proceedings 18.12.1997, it cannot be said that the respondents, in stating that the petitioner was free to submit a fresh statutory complaint, had, by inference, agreed that the petitioner was deemed to be in service and that his request to withdraw his earlier request for premature retirement had been accepted. The contention of Capt. K.M. Saxena, in this regard, has necessarily to be rejected.

This Court, by order in W.P.Nos.32069 and 29779 of 1997 dated 9.2.1998, took note of the fact that the learned counsel for the petitioner while arguing the matter had only sought the relief that the respondents be directed to decide and pass

appropriate orders on the statutory complaint filed on 1.1.1998 and as the respondents had themselves stated in the counter that the petitioner was free to submit a fresh complaint, this court directed the respondents to consider the complaint submitted by the petitioner on 1.1.1998 and dispose of the same within three months. As stated supra, the statutory complaint filed on 1.1.1998, was with regards, denial of promotion to the rank of Brigadier and had no connection with the petitioner's request for withdrawal of his application seeking premature retirement. Despite W.P.No.32069/97 being filed, questioning the proceedings of the 3rd respondent dated 23.9.1997, in accepting the petitioner's request for premature retirement, and though this court did not grant any relief in this regard, the petitioner chose not to prefer an appeal and the order of this court in W.P.No.32069 of 1997 attained finality. This Court, in its common order dated 9.2.1998, specifically held that the only relief sought for by the petitioner was for a direction, that his statutory complaint filed on 1.1.1998 be decided. It is clear therefrom that the petitioner did not press for an adjudication on the validity of the proceedings dated 23.9.1997 whereby his request for premature retirement had been accepted. The order of this Court in W.P.No.32069 of 1997 is a judgment inter parties and since the said order has attained finality, it is not open for the petitioner to challenge the very same proceedings by way of a subsequent writ petition. Since the order of this Court in W.P.No.32069 of 1997 has attained finality, the petitioner is not entitled to challenge the very same proceedings subsequently in W.P.No.21919 of 1998. Challenge in the present writ petition to the impugned proceedings dated 23.9.1997 must therefore be rejected at the threshold.

Learned Assistant Solicitor General would place reliance on Regulation 105 (e) of the Defence Service Regulations, which reads as under:

"Every officer desirous of leaving the Army Service by resigning or retiring prematurely should apply after weighing the pros and cons of premature retirement/resignation because requests for withdrawal of such requests subsequently, when the same are at advanced stages of considerations cause administrative difficulties. The applicant officer should, therefore, resort to premature retirement/resignation as a last resort when no other practical alternative is available to him. If he has any grievances with regard to posting, adverse remarks in ACR, punishment and so on, he, should first seek redressal through prescribed channels and submit his application only when he finally decides to leave the service unconditionally. While making an application, he should give an undertaking that he will not withdraw his request after it has been accepted"

Learned Assistant Solicitor General would also place before this Court a copy of the petitioner's application dated 4.2.1997 wherein the petitioner had requested that he be permitted to immediately and unconditionally retire prematurely. The contents of the said application dated 4.2.1997 are as under:-

"1. I MR-04117 K.Col RR Kumar have the honour to submit this application and would like to go on premature retirement immediately and unconditionally for the following reasons:-

a. I am the eldest son of the family and my father is no more. My mother is aged about 75 years and is ailing. We have lot of property and said property has to be distributed amicably to my brothers and sisters as per the wish of my late father. I being the eldest son of the family it is my solemn duty to take up the responsibility which I can only achieve it b leaving the service at the earliest opportunity.

b. I had put in more than 31 years of service in Army and I have commanded three units including a tenure as Instructor in AMC Centre and School, Lucknow before I came to MH Secunderabad on posting during April 1994. Till date I had served the Corps with lot of initiative, zeal, sincerity and wit total loyalty to my superiors. Wherever I served, I proved to be an asset to the unit/institution. In view of my above qualities, to the best of my belief and knowledge, I have been earning out standing reports n my ACR from my IO and RO's for the past five years. And yet, to my utter surprise and disappointment I have learnt that I could not be found fit for promotion to the rank of Brg in the recent promotion board held on 19 Dec 1996. It is certainly disheartening and demoralizing to me and I think that I should not aspire beyond Colonel rank in the present scenario being an Adm Care Officer.

c. My career in AMC has been most cherishable and memorable. I really consider it as a privilege to have enjoyed the comraderie, love and affection of my superiors including my subordinates and colleagues.

2. In view of the above afore said reasons, I have decided o seek premature retirement with a heavy heart before I turn into a frustrated and disgruntled officer. An asset officer should not become a liability to the Corps in view of my supersession and I feel it is better to quit the service with honour and dignity rather than to serve under humiliation. I therefore request that my premature retirement application may be considered sympathetically and I be released from service immediately"

Petitioner also gave an undertaking that he would not withdraw his request after the same had been accepted. He also submitted a certificate, counter signed by his Commandant, that he would not withdraw his request for premature retirement even if he was selected for promotion to the next higher rank by a subsequent board. He also submitted a certificate that he had read the earlier letters on the subject, had understood the contents and implications and had opted for premature retirement as a conscious decision. His Commandant issued a genuineness certificate stating that the domestic grounds put forth by the petitioner had been personally reviewed by

him and were found valid. The petitioner's Commandant recommended his request for premature retirement. It is clear therefrom that not only had the petitioner taken a conscious decision to seek premature retirement, but had also given a certificate that he would not withdraw his request. His request for premature retirement was for domestic reasons in addition to the fact that he was denied promotion to the rank of Brigadier.

Learned Assistant Solicitor General would contend that Regulation 105(e) requires an officer, seeking premature retirement, to weigh the pros cons before he submits such an application and that premature retirement must be sought only as a last resort. Capt.K.M.Saxena would refer to Regulation 105(h) which provides that if an officer is forced to seek withdrawal of his application due to unforeseen reasons, after acceptance of his request for premature retirement/resignation but before he is retired, he may apply to the Central Government and his request may be granted at the discretion of the Central Government. Regulation 105(h) applies only where withdrawal of an application for premature retirement is sought for unforeseen reasons. In the case on hand, the decision to seek premature retirement was a conscious decision. Regulation 105(h) has therefore no application. Reliance placed by the petitioner on the judgment of the Delhi High Court in **Major K.K.Sethi**[2] is also of no assistance. In the said judgment, after relying on the judgment of the Supreme Court, in **Balaram Gupta**[1]**,** taking note of Regulation 105 (e) and the fact that the petitioner therein had applied for premature retirement stating certain reasons, had thereafter re-married and as he thought that it would be better for his future prospects to remain with the respondents, he had addressed letter dated 22.3.1993, withdrawing his earlier application seeking premature retirement, the Delhi High Court held that change of circumstances, on account of second marriage of the petitioner with the daughter of an Army Officer and other reasons which persuaded the petitioner to change his mind and stay with the respondents, would bring his case within para 105(h) of the Defence Service Regulations. The facts of the present case, however, stand on a different footing. No change in circumstances necessitating withdrawal of the application have been specified herein. Further, the petitioner herein had given an unconditional undertaking, along with his application seeking premature retirement, that he would not withdraw his application later. The judgment of the Delhi High Court has therefore no application to the facts of the present case.

On the question of denial of promotion of the petitioner to the rank of Brigadier, Capt. K.M.Saxena, learned counsel for the petitioner, would contend that the petitioner's commandant had erroneously graded the petitioner as between 7 and 9 marks, and that the petitioner was informed by his commandant that he had done so by mistake. Learned counsel would contend that the ratings recorded by the commandant formed the basis for the petitioner being denied promotion to the rank of Brigadier. Sri A.Rajasekhar Reddy, learned Assistant Solicitor General, produced the ratings sheets. The numerical scale for ranking an officer, in the Annual Confidential Reports (ACR), ranges from 1 to 9 viz., 1 – for exceptionally poor; 2 – for poor; 3 – for below average; 4 – low average; 5 – average; 6 – high average; 7 – above average; 8 – outstanding and 9 – exceptionally outstanding. Capt. K.M.Saxena, would submit that while a candidate could be awarded between 8 and 9 marks, if the assessing officer is of the view that he falls between outstanding and exceptionally outstanding, no officer could marked between 7 and 9, inasmuch such a wide variation would not be found in the performance of any officer. The particulars in the rating sheets would belie this contention. Neither has the petitioner's commandant awarded him between 7 and 9 marks nor did he subsequently change the ratings. Composition of the Selection Boards in the Armed Forces Medical Services, for promotion of officers to the rank of Brigadier and equivalent, consists of the Army Commander/Vice Chief of Armed Staff and equivalent from each of the three services to be nominated by the respective Chiefs of Staff, (Senior most to be the Chairman and the other two Members), the Director General Armed Forces Medical Services, Director General Medical Services (Navy) and Director General Medical Services (Air) as the members and the Director General Medical Services (Army) as the Member Secretary. The number of vacancies for the period under consideration, normally a calendar year, would include the number of anticipated retirement vacancies and promotion vacancies plus 10% reserve. Vacancies arising out of retirement on 31st December of a year is taken into account in the same year for the purpose of calculation of vacancies. The Zone of consideration is worked out taking fresh candidates equal to two times the number of vacancies arising for the period under consideration in the order of seniority in addition to the officers graded 'R' (i.e., not selected by the previous board). The Selection Board is generally convened once a year, except where it is necessary to assemble more than once. The Selection board grades all officers in the zone of consideration in the order of merit.

The selection list is then arranged according to seniority for placement on promotion. All the ACRs are taken into account for the purpose of promotion from Colonel to Brigadier. The average of the ACRs (IO+RO+SRO+NSRO+DGMS+DGAFMS) and TR (FTO + STO+HTO) are worked out separately for each officer, being considered for promotion. The average, of all the individual reports, is taken to calculate the final average of that particular assessment year. Thereafter, the final average of all the ACRs in the present rank is computed. Each officer is entitled to be considered thrice for promotion to each rank and if he is rejected thrice, he would be graded 'U' (unfit for further promotion). An 'A' grading given to an officer is for accelerated promotion to the next higher rank, 'B' grading – fit for promotion in his own turn, 'D' grading – to defer consideration of the case till assessment by the Review Board and an 'R' Grading, if the officer is unfit for promotion at present. On finalization of proceedings, all proceedings of the Selection Board are to be forwarded to the Ministry of Defence for obtaining approval of the Central Government.

The promotional policy and the procedure prescribed therein was followed by the Selection Board when the petitioner's case was considered for promotion to the rank of Brigadier. The period of assessment related to the years 1994-95 and 1995-96. The petitioner's ACRs for these two years were rated independently by the above referred officers of the selection committee. A perusal of the ranking sheets and the marks awarded by each officer, reveal that there is not much variance in the marks awarded by each of the officer concerned. In fact, the petitioner was awarded average marks above 7 and below 8. The overall grading of the petitioner was between 'above average' and 'outstanding'. As indicated in the promotion policy, candidates who are ranked below 'outstanding' are rated as 'R' which indicates that the candidate is considered not fit to be promoted for the present. Allegations regarding discrepancies in the manner of rating, is without any basis.

In **Dalpat Abasaheb Solunke v. Dr.B.S.Mahajan**, the Supreme Court held thus:

"It will thus appear that apart from the. fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the

Selection Committees and to scrutinize the relative merits of the candidate tes. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its Jurisdiction."

In **Lt.Col.K.D.Rana**[4], this Court took note of the procedure adopted for selection to posts in defence services and held thus:

"It is stated by the learned Senior Central Government Standing Counsel that the assessment of an officer in Annual Confidential Reports is regulated by the Special Army Order 3/S/89 and other relevant policies. The grindings are numerical from 1 to 9 (overall as well as in personal qualities and performance variables in different qualities) and in the form of pen picture also. The entire assessment of an officer inany annual Confidential Reports consists of assessment on various reporting Officers whose assessment is independent of each other. While considering an officer for promotion to a selection rank, the Selection Board takes into consideration number of factors such as war/operational reports, course reports, Annual Confidential Reports, performance in command and staff, honours and awards, disciplinary background. Therefore, it is incorrect to state that Annual Confidential Reports alone are the criteria for promotion. Selection/rejection is based upon the overall profile of an officer vis-à-vis his comparative batch merit. The petitioner did not make a grade, based on his overall profile as compared to the comparative batch merit. The Selection Board assessed the relative merit of various officers and selected the more suitable and meritorious candidates.

The perusal of the records shows that though the Annual Confidential Reports of the petitioner from 1992-93 and from 1995-98 are well balanced, corroborated each other, moderated and consistent with overall profile of the officer and all the Annual Confidential Reports earned by the petitioner in the reckonable profile are also well balanced. But, the others are found more meritorious than the petitioner and therefore, the petitioner was not selected for the next post of full Colonel. The Selection Board has taken into account the total profile of the petitioner's Annual Confidential Reports and on appraisal of the same on the entire service profile, which has been taken care by the authorities concerned, but still others were found more meritorious than the petitioner and therefore, the petitioner was not selected to the higher post and therefore, the said decision cannot be interfered by this Court. For the aforesaid reasons, I do not find any merits in the writ petition and the petitioner is not entitled for any relief."

In the present case also, the marks awarded by each of the assessing Officers is more or less similar. There is no wide variance as alleged. Since the Selection

Board found others more meritorious and was of the view that the petitioner was unfit for promotion for the present, he was rated 'R'. No interference is called for, in the facts and circumstances of the present case, more so as this Court, in proceedings under Article 226 of the Constitution of India, would not sit in appeal over the decision of the Selection Committee. Learned Assistant Solicitor General would contend that the scope of scrutiny is far more limited when it relates to promotion in the Armed Forces. While dealing with an order of transfer the Apex Court, in **Major General J.K.Bansal**[3], held thus:-

"It will be noticed that these decisions have been rendered in the case of civilian employees or those who are working in public sector undertakings. The scope of interference by the courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."

While the submission of the learned Assistant Solicitor General is not without merit, it is wholly unnecessary for this court to decide as to whether or not the degree of judicial scrutiny, of promotions in the Armed Forces, is far more limited than promotions in other services, for on a perusal of the record placed before it, this Court is satisfied that the whole procedure adopted by the Selection Board and the marks awarded by each of assessing officers in the ACRs of the petitioner is fair and reasonable. Denying the petitioner promotion to the rank of Brigadier cannot be said to be arbitrary or illegal or in violation of Articles 14 and 16 of the Constitution of India. Rejection of the statutory complaint, submitted by the petitioner on 01.01.1998, by the Central Government by its order dated 26.3.1998, does not call for interference.

Both the writ petitions fail and are accordingly dismissed. However, in the circumstances, without costs.

Date: .03.2006 RAMESH RANGANATHAN, J

ASP/MRKR